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Nos. 14-556, 14-562, 14-571, 14-574

IN THE

Supreme Court of the United States

OBERGEFELL, JAMES, ET AL.,
PETITIONERS,

v.

HODGES, RICHARD, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICI CURIAE* EQUALITY OHIO, EQUALITY OHIO EDUCATION FUND, AND THREE GAY AND LESBIAN COUPLES IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

OHIO'S CONSTITUTION DEPRIVES SAME-SEX COUPLES OF IMPORTANT RIGHTS AND OBLIGATIONS AVAILABLE TO OPPOSITE-SEX COUPLES. 4

SUMMARY OF ARGUMENT 12

ARGUMENT 14

The Justifications Offered by the Court of Appeals for the Ohio Laws Precluding the Provision of Any Rights to Gay Couples in Ohio Cannot Withstand Analysis No Matter What Standard of Review the Court Applies. 14

Tradition 16

Encouraging Responsible Procreation 18

CONCLUSION 22

ADDENDUM A-1

TABLE OF AUTHORITIES

Cases

Goodridge v. Department of *Public Health*, 798 N.E.2d 941 (2003) 17

In re Adoption of Doe, 719 N.E.2d 1071 (Ohio Ct. App. 1998) 8

Lawrence v. Texas, 539 U.S. 558 (2003) 14

Romer v. Evans, 517 U.S. 620 (1996) 12

United States v. Windsor, 133 S. Ct. 2675 (2013) 12, 13, 14, 15

Constitions

Ohio Const. art. XV, § 11 ..... 2, 5, 21

Statutes

Ohio Rev. Code Ann. § 102.01(D) 10

Ohio Rev. Code Ann. § 102.02(A)(1) 10

Ohio Rev. Code Ann. § 102.03(C) 10

Ohio Rev. Code Ann. § 144.02 8

Ohio Rev. Code Ann. § 145.45(B) 6

Ohio Rev. Code Ann. § 2105.06 9

Ohio Rev. Code Ann. § 2106.10 9

Ohio Rev. Code Ann. § 2125.02(A)(1) 9

Ohio Rev. Code Ann. § 2133.08(B) 9

Ohio Rev. Code Ann. § 2907.01(L) 8

Ohio Rev. Code Ann. § 2907.02(A) 8

Ohio Rev. Code Ann. § 3101.01 4

Ohio Rev. Code Ann. § 3103.03 8

Ohio Rev. Code Ann. § 3105.10(A) 10

Ohio Rev. Code Ann. § 3105.171 10

Ohio Rev. Code Ann. § 3107.03 7

Ohio Rev. Code Ann. § 3331.12 8

Ohio Rev. Code Ann. § 4123.59(D)(1) 10

Ohio Rev. Code Ann. § 5747.08(E) 6

Ohio Rev. Code Ann. § 5814.01 8

Ohio Rev. Code Ann. § 742.02 ..... 6, 10

Other Authorities

Brief of the National Association for the Advancement of Colored People as Amicus Curiae, Loving v. Virginia, 388 U.S. 1 (1967)1967 WL 113930, at 2, note 2 4

Ohio Dep't of Taxation, Individual Income Tax: Who Must File 6

Ohio Police & Fire Pension Fund, Member's Guide to Health Care Coverage for 2014 7

State of Ohio Employee Benefits Guide 5 (2014-15) 7

INTEREST OF AMICI CURIAE[1]

This brief is being submitted on behalf of Equality Ohio and Equality Ohio Education Fund, along with three gay and lesbian couples, each of whom is in a committed, long-term relationship. Equality Ohio is a 501(c)(4) non-profit organization whose mission is to achieve fair treatment and equal opportunity for all Ohioans, regardless of their sexual orientation. It was founded in 2005 after Ohio voters passed the constitutional amendment banning gay marriage and civil unions that is at issue in this case. Equality Ohio Education Fund is a 501(c)(3) non-profit educational organization sharing the same goals. Together, they are supported by more than 135,000 Ohioans from around the state. The particular harms suffered by the three amici same-sex couples are more fully described *infra* at 11.

Amici, who filed a brief in support of petitioners-plaintiffs in the Court of Appeals, seek to obtain equal treatment with other Ohioans, and in particular to secure the very significant and concrete rights and benefits, and to accept the obligations, that come with marriage for straight couples in Ohio. The ban on marriage for same-sex couples in Ohio is particularly egregious because it

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[1] This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part, and no one other than the amici or their counsel contributed money that was intended to fund the preparation or submission of this brief. Amici had additional counsel for their brief in the Court of Appeals who conducted much of the research for this brief. None of those counsel is counsel for a party in this Court.

not only denies gay couples access to marriage, but expressly prohibits civil unions or any other similar legal relationship.

STATEMENT OF THE CASE

The petition in this case covers two separate cases from Ohio. The first, on which this brief will focus, was originally filed by petitioner James Obergefell on behalf of his husband, John Arthur, whom he had legally married in Maryland. Petitioner sought to have his spouse's death certificate reflect that marriage, but Ohio officials refused, insisting that the couple was not married. That refusal was based on Article XV, section 11 of the Ohio Constitution (the "Constitutional Amendment"), which states that:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Obergefell was subsequently joined as a plaintiff by petitioner David Michener, who also sought to correct the death certificate of his deceased spouse William Ives, whom Michener legally married in Delaware.

The District Court held that Ohio's ban on marriages by same-sex couples was unconstitutional, and another District Court in Ohio sustained a similar challenge by petitioners Brittani Henry and others. On appeal, the two Ohio cases were heard along with similar challenges to similar laws from judgments favoring the plaintiffs in cases from Michigan, Kentucky, and Tennessee. A divided Court of Appeals reversed. In upholding the laws of all four states, the majority essentially justified its ruling on two bases: (1) the states were doing no more than upholding the traditional definition of marriage, even though they enshrined their bans in their Constitutions; and (2) the states had done no more that decide to subsidize opposite-sex marriages in order to create an incentive for opposite-sex couples to procreate in marriage, instead of outside of it. It so ruled even though the benefits of marriage extend far beyond opposite-sex couples who wish to have children, while the law also denies same-sex couples who have children and are raising them as their joint parents the benefits afforded opposite-sex couples whether they have children or not. Before demonstrating why those purported justifications are legally insufficient, we first explain the harms that same-sex couples are denied as a result of Ohio's ban on marriages by same-sex couples, as well as banning any other relationship "that intends to approximate the design, qualities, significance or effect of marriage."

OHIO'S CONSTITUTION DEPRIVES SAME-SEX COUPLES OF IMPORTANT RIGHTS AND OBLIGATIONS AVAILABLE TO OPPOSITE-SEX MARRIED COUPLES.

For generations the laws of Ohio have recognized the institution of marriage. As shown in the Addendum to this brief, Ohio Revised Code Annotated § 3101.01 today limits the right to marry to one man and one woman, and states the ages at which they may marry, as well as precluding marriage if the persons are "nearer of kin than second cousins." At one time Ohio banned inter-racial marriages, but that ended in 1877.[2] Other than those limits, until the issue of marriages for same-sex couples arose, there is no history of Ohio treating marriage as anything other than the state's recognition that a couple that wished to marry agreed to accept the benefits and burdens of marriage. There is no evidence that the state created the institution of marriage in order to confer a subsidy or benefit to those who chose to marry. To the extent that benefits now flow from marriage, it is because Ohio created such benefits and decided that married couples should be among the beneficiaries. And there is not a hint anywhere that Ohio choose to limit marriages to opposite-sex couples because, like taxi medallions in New York City, they were in short supply, and the State could not afford more. But with

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[2] Brief of the National Association for the Advancement of Colored People as Amicus Curiae, *Loving v. Virginia*, 388 U.S. 1 (1967)1967 WL 113930, at 2, note 2.

the enactment of the Constitutional Amendment, Ohio has now excluded otherwise eligible couples from being married solely because the couple are both of the same gender.

Ohio not only prohibits lesbian and gay couples from marrying in Ohio and refuses to recognize their lawful, out-of-state marriages (including recognition of non-Ohio marriages on a death certificate), but also bars civil unions or any formal relationship resembling marriage Ohio's Constitutional Amendment could hardly be more explicit when it states that "[t]his state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the *design, qualities, significance or effect of marriage.*" Ohio Const. art. XV, § 11 (emphasis added).

This language on its face prohibits Ohio from providing even specific, discrete benefits to gay and lesbian couples, such as the right to make medical decisions for one's partner in case of emergency, or the right to participate as a family member in a health insurance plan. In other words, gays and lesbians in Ohio are permanently disabled under Ohio law from being treated as anything other than second-class citizens. This is as true for the corrected death certificates sought by the Obergefell petitioners as it is for the more expansive benefits and recognition sought by amici. Because the Constitutional Amendment applies to marriage and to any legal status that might provide benefits as an alternative to marriage, the issue before the Court is whether Ohio's prohibition on lesbian and gay people from ever obtaining *any* rights as committed couples passes constitutional muster.

Set forth below are an illustrative, although not exhaustive, description of the more significant rights and benefits that are not available to same-sex couples in Ohio:

- **Income tax**. Ohio law authorizes only married couples to file joint tax returns. *See* Ohio Rev. Code Ann. § 5747.08(E); *see also* Ohio Dep't of Taxation, Individual Income Tax: Who Must File, *available at* http://www.tax.ohio.gov/ohio_individual/individual/who_must_file.aspx (explaining that gay and lesbian couples who file federal income taxes jointly must still file Ohio state income taxes separately). For couples such as amici, who keep joint accounts and co-own property, being able to file joint returns that reflect their financial interconnectedness, would obviate the unnecessary complication and expense of filing taxes as if they lived separate financial lives. In addition, for some couples, filing jointly would reduce their overall tax burden.

- **Retirement and health benefits for public employees**. Public employees in Ohio are entitled to participate in generous state retirement plans and access affordable healthcare for their families. However, some of the most favorable benefits available under the Ohio Public Employees Retirement System and the Ohio Police & Fire Pension Fund are available *only* to the "spouse" of a retiree, and not to any other designated beneficiary. *See, e.g.*, Ohio Rev. Code Ann. § 145.45(B)(2)(a) (providing benefits to "qualified survivors," including a "surviving spouse"); Ohio Rev. Code Ann. § 742.02 (creating the Ohio Police &

Fire Pension Fund "for the purpose of providing disability benefits and pensions to members of the fund and their surviving spouses, children, and dependent parents"). Some public employees, including amicus Sarah Marshall, purchase health insurance through a medical plan sponsored by the State. An employee's spouse can join the plan for a nominal fee, but gay and lesbian partners, including Sarah's partner Tara, are not allowed to do so.[3]

- **Family and parenthood**. Ohio law has been interpreted as barring lesbian and gay partners from jointly adopting children. Ohio Rev. Code Ann. § 3107.03(A) (permitting joint adoptions by "husband and wife"). Even where a gay or lesbian individual, prior to cohabitating, lawfully adopted a child, Ohio law prevents a same-sex partner from later becoming a second parent to that child. Curiously (and irrationally), state law nonetheless authorizes single individuals – gay and straight - to adopt. Ohio Rev. Code Ann. § 3107.03(B) (an "unmarried adult" may adopt). However, if a gay or lesbian individual enters into a committed, long-

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[3] *See* Ohio Police & Fire Pension Fund, Member's Guide to Health Care Coverage for 2014 at 5-7, *available at* http://www.op-f.org/Files/HCmemberGuide2014.pdf (listing eligible beneficiaries as a spouse, child, or dependent parent); Ohio Dep't of Admin. Servs, State of Ohio Employee Benefits Guide 5 (2014-15), *available at http://das.ohio.gov/Portals/0/DASDivisions/HumanResources/BA/pdf/New%20Employee%20Guide%202014-15%20-%20Updated%2020150210.re.pdf* (listing as eligible beneficiaries "[y]our current legal spouse as recognized by Ohio law."); *id.* at 7 ("Examples of persons NOT eligible for coverage as a dependent include . . . Same-sex partners" (emphasis in original)).

term relationship and lives with his or her partner, the State prevents that child from benefiting from having two loving parents rather than only one. *See In re Adoption of Doe,* 719 N.E.2d 1071 (Ohio Ct. App. 1998) (prohibiting "second parent" adoption by lesbian partner of child's biological mother). Further, the inability to establish a legally recognized parent-child relationship excludes gay and lesbian couples and their children from the many rights and obligations attendant to the parent-child relationship arising under other provisions of Ohio.[4]

- **Healthcare decisions.** Ohio law presumes that gays and lesbians are not qualified or permitted to make medical decisions on behalf of their committed, long-term partners. In the absence of an advance health-care directive, the following individuals, in order of priority, are appointed as surrogates: the patient's guardian, spouse (which does not include a same-sex partner), adult child, parent, sibling, or the nearest adult

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[4] *See generally, e.g.*, Ohio Rev. Code Ann. Title 1 (State Government § 144.02 benefits for "dependents and survivors" of municipal employees); Ohio Rev. Code Ann. Title 29 (Crimes §§ 2907.01(L), 2907.02(A), rape exception for spouse); Ohio Rev. Code Ann. Title 31 (Domestic Relations § 3103.03, obligations to support only extends to spouse and minor children of parent); Ohio Rev. Code Ann. Title 33(Education - § 3331.12, prohibiting child under age of 14 from working for person not parent or guardian); Ohio Rev. Code Ann. Title 58 (Transfer to Minors Act, § 5814.01(J) ("Member of the minor's family" means "a parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt of the minor, whether of the whole or half blood, or by adoption").

relative not already described. Ohio Rev. Code Ann. § 2133.08(B). Ohio does not authorize a gay or lesbian partner to be in that line of succession.

• **Probate, transfer of assets, and statutory claims.** Ohio estate law protects and provides for surviving spouses, but denies those rights to surviving gay and lesbian partners. Same-sex partners are prevented from obtaining the elective share a surviving spouse is able to take from the decedent's estate, even when the decedent's will makes no provision for such support. Ohio Rev. Code Ann. § 2106.01.[5] That property can be used to support the surviving spouse and the couple's minor children. The surviving spouse may also elect to receive the decedent spouse's entire interest in the couple's home. *See* Ohio Rev. Code Ann. § 2106.10. Additionally, same-sex partners are not included in the laws of intestate succession. *See* Ohio Rev. Code Ann. § 2105.06.

Gay men and lesbians in Ohio are also excluded from statutory rights of action for wrongful death—the cause of action is "for the exclusive benefit of the surviving spouse, the children, and parents of the decedent," which excludes a surviving same-sex partner. Ohio Rev. Code Ann. § 2125.02(A)(1). Similarly, if there is a workplace accident resulting in death, a spouse—but again,

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[5] Other laws are also interrelated with Ohio's scheme of intestate succession. For example, where an owner of securities has not filled out a "beneficiary form," upon death the security is transferred in accordance with the order of precedence established by the Trusts Code, which does not include same-sex spouses. *See* Ohio Rev. Code Ann. § 1709.01.

not a gay or lesbian partner—is authorized to collect worker's compensation. Ohio Rev. Code Ann. § 4123.59(D)(1). And while spouses of certain public employees (such as firefighters, like Sarah Marshall) who die in the line of duty are entitled to statutory death benefits, same-sex partners are excluded from these benefits. Ohio Rev. Code Ann. § 742.02.

- **Misc. Duties.** With rights, of course, come obligations. Gay and lesbian couples in Ohio are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its responsibilities. Thus, when a gay or lesbian couple separate, there are no available options for legally-sanctioned divorce, alimony, or child support. *See* Ohio Rev. Code Ann. § 3105.10(A) (divorce only available for those in a "marriage"); Ohio Rev. Code Ann. § 3105.171, 3105.21 (divorce proceeding needed to enter orders related to the disposition of property, alimony, and child custody).

Other duties outside the family also do not apply to gay and lesbian couples. Thus, a state employee who is gay or lesbian is not required to disclose information about his or her partner for conflict of interest purposes. *See, e.g.*, Ohio Rev. Code Ann. § 102.01(D) (defining "immediate family" as "a spouse residing in the person's household and any dependent child"); Ohio Rev. Code Ann. § 102.02(A)(1) (requiring disclosure by state government officials of names under which a spouse conducts business); Ohio Rev. Code Ann. § 102.03(C) (prohibiting public officials and employees from participating in any license or rate-making proceeding that affects the license or rates

of a business owned or controlled by immediate family).

These harms have directly injured the three amici couples as well as other gay and lesbian couples represented by Equality Ohio. Thus, Tara Robertson and Sarah Marshall have been together in a committed relationship for the past four years. Both have lived in Ohio their entire lives, and would like to marry in their home state. Sarah works as a firefighter and paramedic for the City of Dayton, and Tara works as an auto mechanic. They would like to file joint tax returns and participate jointly in the state health system. They are not permitted to do either solely because they are lesbians.

Timothy Broud and Richard Moore have been together for approximately twenty-four years and plan to marry. Each has lived in Ohio his entire life. Timothy has suffered from major health issues in the past, and Richard has always been there for him during hospital stays. On many occasions, however, hospitals have refused to speak to Richard about Timothy's treatment because he is not a legal spouse.

Angela Wellman and Julie Lamere have been in a relationship for twelve years. In 2005, they traveled from Ohio, where both have lived their entire lives, to Vermont in order to enter into a civil union. Julie works in human resources for a private, non-profit organization, and Angela works as a Student Life Coordinator for the Multicultural Center at Ohio State University. Angela and Julie would like to marry in their home state of Ohio.

These harms are inflicted on amici and all other gay and lesbian couples in Ohio solely

because they wish to marry a person of the same gender. As this Court observed, the protections afforded by these laws are "taken for granted by most people either because they already have them or do not need them [yet same-sex couples are excluded] from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). In addition to these harms under Ohio law, now that Section 3 of DOMA has been declared unconstitutional, *United States v. Windsor*, 133 S. Ct. 2675 (2013), same-sex couples in Ohio who wish to marry are also denied all benefits under federal law that apply only to couples married under state law.

SUMMARY OF ARGUMENT

No matter what standard of review is applied, the two reasons given by the Court of Appeals do not suffice to sustain the ban on marriages for same-sex couples, civil unions, and all other relationships that might "approximate" marriage. The principal substantive defense offered is that limiting marriage to opposite-sex couples "subsidizes" those marriages, thereby encouraging those couples – and only those couples – to raise their children as a married couple, which will bring stability and other benefits to the children. That rationale is both vastly over and vastly under inclusive. It is over inclusive because (a) marriage among opposite-sex couples is not limited to those who either have or promise to have children; (b) the "subsidy" of marriage extends to many benefits that have nothing to do with children;

(c) the subsidy is not conditioned on parents staying together until all their children reach majority; and (d) the subsidy continues long after the children have left home and are having children of their own.

It is under inclusive because it excludes same-sex couples whose children need the same benefits as do the children of opposite-sex couples in order to develop into happy and productive adults. Moreover, the ban extends beyond marriage to civil unions and similar relationships, yet there is no rationale comparable to the marriage subsidy that could possibly justify applying the ban to civil unions, which denies same-sex couples the other benefits of marriage under Ohio and, after *Windsor,* federal law.

The Sixth Circuit's other justification – "tradition" or, as it sometimes put, the desire to "proceed slowly" – fares no better. Erecting a constitutional barrier against marriage for same-sex couples does not conform to any recognized tradition in Ohio. Moreover, that barrier is a "full stop," not a "go slow" sign, because the amendment makes it impossible for the Ohio legislature alone to change directions in the future. Furthermore, because civil unions are a phenomenon of the 21st century, there is surely no "tradition" as to them, and especially no tradition of denying the legislature the authority to create civil unions and extend the rights available to straight couples to same-sex couples who are ineligible to marry under Ohio law.

The utter irrationality of these laws is clear from total lack of fit between the stated justifications and what Ohio law actually does. Indeed, the State denied the requests of petitioners Obergefell and Michener to correct the death certificates of their

deceased spouses, to whom they were lawfully married out of state, solely because Ohio law bans marriages between same-sex couples. But those denials have no connection whatsoever to the tradition and subsidy justifications accepted by the majority below. Instead, they send out the clearest message that the reasons offered to support Ohio's laws relating to the marriages of same-sex couples are a façade, designed to cover up Ohio's disapproval of the lives of same-sex couples, which this Court made clear in *United States v. Windsor,* 133 S. Ct 2675 (2013), and *Lawrence v. Texas,* 539 U.S. 558 (2003), are constitutionally insufficient.

ARGUMENT

The Justifications Offered by the Court of Appeals for the Ohio Laws Precluding the Provision of Any Rights to Gay Couples in Ohio Cannot Withstand Analysis No Matter What Standard of Review the Court Applies.

Section 3 of the Defense of Marriage Act ("DOMA") excluded same-sex couples from the definition of marriage under all federal laws. In his opinion holding section 3 unconstitutional in *Windsor,* Justice Kennedy emphasized that the ban "touches many aspects of married and family life, from the mundane to the profound . . . [and] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force." 133 S. Ct. at 2694, 95. Many of the same kind of injuries wrought by DOMA are present here: DOMA "prevent[ed]" access

to "government healthcare benefits"; "deprive[d]" gay and lesbian couples "of the Bankruptcy Code's special protections"; "prohibit[ed]" same-sex couples "from being buried together in veterans' cemeteries"; rendered "inapplicable" protections for the family members of United States officials, judges, and federal law enforcement officers; "br[ought] financial harm to children of same-sex couples . . . [by] rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses"; and "denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, . . . [which] are an integral part of family security." *Id.* at 2694–95.

It cannot be seriously disputed that Ohio's Constitutional Amendment does exactly the same thing here. Just as DOMA worked to "impose restrictions and disabilities" on gays and lesbians, the Ohio Constitution imposes on the Ohio Code and administrative regulations the requirement to deny scores of significant benefits and rights to Ohio citizens, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2692, 2694. They include financial decisions and financial security, familial relationships and parental obligations, access to healthcare and the authority to make medical decisions for a loved one, and estate planning and the transfer of assets – most of which accrue to married couples without regard to the presence of children. The deliberate withholding of these statutory protections from committed gay and lesbian couples in Ohio offends basic principles of equal protection.

The briefs of the parties and other amici will demonstrate why heightened scrutiny is required. In our view, even if rational basis applied, the Ohio laws

at issue cannot be upheld. The majority opinion of Circuit Judge Sutton essentially offers two reasons why the bans are constitutional: (1) they encourage procreation in marriage by opposite-sex couples, and (2) they uphold traditional marriage, while allowing for future changes. Neither suffices.

At the outset, we note three undisputed facts that, as we explain below, demonstrate conclusively that those reasons cannot sustain Ohio's ban: (1) most of the benefits of marriage for opposite-sex couples are unrelated to encouraging procreation; (2) the laws also preclude civil unions or any other legal arrangement that confers the benefits of marriage on same-sex couples; and (3) the Ohio ban was applied to deny the surviving members of a same-sex marriage performed out of state the right to include on the death certificate of his husband the indisputable fact that he was "married."

Tradition

This argument asserts that the states did no more than maintain a centuries-old tradition of recognizing that marriage is only between a man and a woman, while proceeding cautiously and leaving open the door to marriages by same-sex couples. But if tradition were a legitimate basis for bans on certain kinds of marriages, the challenge to the ban on inter-racial marriages struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), would have come out the other way.

Second, in denying the right of same-sex couples to marry, Ohio did much more than retain the status quo. Such marriages are already precluded by statute, *see* Addendum. The amendment enshrined their second-class status in

the state constitution, hardly the equivalent of going slowly. Judge Sutton also asserted that a constitutional amendment imposing a ban on same-sex marriages was necessary to prevent "courts from seizing control over an issue that people of good faith care deeply about" (Pet. App. 42a), as the Massachusetts Supreme Court did when it found that denying the right to marry to same-sex couples violated its state constitution. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). But if that is all that was intended, a much narrower amendment would do the job, either by barring state courts from hearing such claims, or adding to the state constitution a provision stating that "Nothing herein shall be construed to create a right to marriage by persons of the same sex." Either route would have made it clear that the state legislature could end the ban, but that the state courts could not.

Third, Ohio also bans civil unions that would at least allow same-sex couples to enjoy benefits such as the right to adopt the partner's children, to visit a partner in the hospital, and to file joint income tax returns. Because civil unions are less than two decades old, there is no tradition at all with respect to them, let alone a tradition of excluding same-sex couples from tangible benefits enjoyed by opposite-sex couples. And by amending its constitution to forbid the Ohio legislature from enacting laws permitting civil unions – or anything resembling them – Ohio went full speed ahead to deny rights and did not simply act to preserve the status quo.

Fourth, Ohio's refusal to allow a same-sex plaintiff who was legally married in another state from stating on his spouse's death certificate that they were "married," is totally unprecedented. Ohio

made no effort to show that it ever questions the asserted marital status of a deceased, let alone that it ever challenged that status. If there had been such a tradition, Ohio would surely have offered evidence that what it did here was no more than a variation of what it regularly does in completing death certificates.

In the end, invoking tradition is another way of saying, "this is the way we've always done it, and we have no obligation to change." That may be an explanation of *how* the law got to where it is now, but it cannot provide a justification for *why* it should remain that way, let alone how it comports with the requirements of Equal Protection.

Encouraging Responsible Procreation

The initial premise of this argument is the undisputed fact that only opposite-sex couples can cause unintended pregnancies. The Court of Appeals majority also contended that a state could reasonably conclude that children produced by individuals who are not married have less favorable outcomes than are children raised by parents who are married. Even if that second conclusion were correct, it does not in any way justify denying same-sex couples the same opportunity to marry and raise their children as dual parents, just like opposite-sex couples. To sustain the exclusion, the Court of Appeals asserted that permitting marriage for opposite-sex couples only was a legitimate means of "subsidizing" the decision to have children within a marriage, rather than outside it. Pet. App. 35a.

That conclusion cannot withstand analysis because there is not the slightest evidence – historic or submitted in the courts below – that anyone, until

this case, claimed that marriage was a form of subsidy, like providing free lunches for school children whose families have income below the poverty level. Moreover, the remedy – limiting marriage to opposite-sex couples – sweeps in vast numbers of people for whom no such incentive is needed or even relevant. Those include the old, the infertile, and those who have no intention of have children. It is also vastly over-inclusive because marriage confers a range of benefits – such as filing joint tax returns, obtaining spousal health insurance, and making health care decisions for a partner who is unable to act on his own – that having nothing to do with procreation of children. In addition, the subsidy is not conditioned on the married couple staying married until their children reach majority, and it continues long after the children have left the home.

Nor is it reasonable to refer to marriage as a form of subsidization of a decision to procreate within a marriage. If that kind of subsidization were actually intended. it would have taken the form of cash payments or tax credits to those who give birth to children in a marriage *and* stay married until the children reach majority. No rational person would conclude that a one-time "payment" of a marriage certificate could possibly be appropriate compensation for what in theory is a promise to raise their children as a married couple, let alone that such subsidy can be justified for the married couples who never have children.

If the government is actually providing a subsidy, such as school lunches, it makes sense to set limits in order to control costs. But there is no hint that there is a limited supply of either marriage

certificates or the benefits that flow from marriage. No one has suggested that Ohio would repeal the laws allowing the filing of joint income taxes, or granting health benefits to married couples, or allowing married couples to make health care decisions for their spouses or inherit their property if there were no will, even if tens of thousands of Ohio residents suddenly decided to marry, thereby vastly increasing the level of the current "subsidy." That is because the decision to deny same-sex couples the right to marry has nothing to do with any form of traditional subsidy known in the law, and is nothing more than an effort to defend the indefensible.

Furthermore, if encouraging families to have stable relations is a goal of the ban, it is irrational to deny children of same-sex couples the benefits of stable families by having two legally recognized parents instead of one. Ohio already allows responsible single adults, including gays and lesbians, to adopt a child; only irrationality can possibly explain why such a child would not be better off having two responsible adult to raise him or her, no matter what their sexual orientation may be.

The ban also applies to civil unions between same-sex couples. By definition, same-sex couples do not need an incentive for responsible procreation, but the desire to reward opposite-sex couples for procreating responsibly cannot justify a ban on the wholly separate status of civil unions. If the ban did not extend to civil unions, same-sex couples would still not receive the "subsidy" of being able to say that they are married, although they would be able to receive the other benefits of such a status. However, the inclusion of the ban on same-sex civil unions and all similar relationships further demonstrates that

the procreation subsidy theory cannot support that aspect of the ban, yet there is no other justification offered to sustain it.

Finally, in Ohio (and not disclaimed by any other state or Judge Sutton), the prohibition extends to denying the surviving member of a same-sex marriage the right to have the status of the relationship with his deceased spouse listed on the death certificate as "married," which is a description of what lawfully occurred in another state. There could not possibly be any connection between the subsidy of encouraging opposite-sex couples in Ohio to procreate within a marriage, and refusing to allow same-sex couples married outside of Ohio to state on the death certificate of one member of a couple the fact that they were legally married elsewhere. The Obergefell petitioners were not seeking any state-conferred benefit or subsidy; all they asked was that the State correct the facts asserted on the death certificates of their spouse, so that they are true, and not false. Even accepting every rationale offered by the State to justify banning marriages by same-sex couples, none of them has even the most remote—*i.e.*, rational—connection with what Ohio did here.

Actions speak louder than words. Ohio's decision to reject petitioners' request to correct factually-inaccurate death certificates, to defend that decision in the trial court, and then to appeal the adverse ruling, reveals what is really going on here. Ohio's effort to apply Article XV, section 11 of its Constitution to the facts of this case leaves no doubt that the true reason behind that Amendment is animus against gays and lesbians. Indeed, that application of the ban on marriages for same-sex couples is the proverbial thirteenth stroke of the

clock, making all that came before suspect, not just as applied to death certificates, but to marriages by same-sex couples and civil unions as well.

When all of the rhetoric is stripped away, the ban on same-sex marriages cannot be justified by the reasons given by Judge Sutton. Unless the Court is willing to sustain the prohibitions on marriage by same-sex couples based on no more than "it's OK because we say so, even if we have no good reasons to support it," these bans cannot survive.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the case remanded with directions to re-enter the judgments of the District Courts in these cases.

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ADDENDUM

Ohio Revised Code Annotated § 3101.01

Persons who may marry; same sex marriages against public policy; recognition or extension by state of specific statutory benefits of legal marriage to nonmarital relationships against public policy

(A) Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman. A minor shall first obtain the consent of the minor's parents, surviving parent, parent who is designated the residential parent and legal custodian of the minor by a court of competent jurisdiction, guardian, or any one of the following who has been awarded permanent custody of the minor by a court exercising juvenile jurisdiction:

(1) An adult person;

(2) The department of job and family services or any child welfare organization certified by the department;

(3) A public children services agency.

(B) For the purposes of division (A) of this section, a minor shall not be required to obtain the consent of a parent who resides in a foreign country, has neglected or abandoned the minor for a period of one year or longer immediately preceding the minor's application for a marriage license, has been adjudged incompetent, is an inmate of a state mental or

correctional institution, has been permanently deprived of parental rights and responsibilities for the care of the minor and the right to have the minor live with the parent and to be the legal custodian of the minor by a court exercising juvenile jurisdiction, or has been deprived of parental rights and responsibilities for the care of the minor and the right to have the minor live with the parent and to be the legal custodian of the minor by the appointment of a guardian of the person of the minor by the probate court or by another court of competent jurisdiction.

(C)(1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.

(2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

(3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio. Nothing in division (C)(3) of this section shall be construed to do either of

the following:

(a) Prohibit the extension of specific benefits otherwise enjoyed by all persons, married or unmarried, to nonmarital relationships between persons of the same sex or different sexes, including the extension of benefits conferred by any statute that is not expressly limited to married persons, which includes but is not limited to benefits available under Chapter 4117 of the Revised Code;

(b) Affect the validity of private agreements that are otherwise valid under the laws of this state.

(4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
MAR 6 - 2015
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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. REPUDIATION OF SLAVERY AND THE EMBRACE OF UNIVERSAL FREEDOM WERE MOTIVATED BY ABHORRENCE OF SLAVERY'S DENIAL OF FAMILY RECOGNITION	6
II. SECURING THE RIGHT OF MARRIAGE RE-COGNITION WAS AN EXPLICIT OBJECTIVE OF THE FOURTEENTH AMENDMENT'S FRAMERS	13
III. WITH PASSAGE OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS EXTENSION OF THE RIGHT OF MARRIAGE RECOGNITION WAS PRESUMED TO BE REQUIRED IN EVERY STATE	18
CONCLUSION	20
APPENDIX	
Contributors in Alphabetical Order	1a

TABLE OF AUTHORITIES

CASES	Page(s)
Andrews v. Page, 50 Tenn. 653 (1870)	7
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CONSTITUTION

U.S. Const. amend. XIII 3, 6, 13, 17

U.S. Const. amend. XIV .....*passim*

U.S. Const. amend. XIV, § 1 ..... 2, 3, 5, 19

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TABLE OF AUTHORITIES—Continued

Page(s)

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STATEMENT OF INTEREST[1]

Since its founding, our country has aspired to respect the dignity and liberty of all people.[2] We floundered at our birth as we tried to reconcile principles of equal dignity with laws that supported human enslavement. The contradictions between respect for human dignity and protection of the rights of some to own and control others plunged us into Civil War. At the end of that war, we reconstructed our Constitution to make the blessings of democratic liberty secure for all of our people.

We are students and scholars[3] with an interest in assuring that the enlightened heritage of emancipation guides interpretation of our reconstructed Constitution.

SUMMARY OF ARGUMENT

Little more than a decade after the Fourteenth Amendment reconstructed our federal system, this

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The parties have consented to the filing of amici curiae briefs.

[2] The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); *see also* Danielle Allen, Our Declaration: A Reading of the Declaration of Independence in Defense of Equality 268-269 (2014) ("Equality is the foundation of freedom because from a commitment to equality emerges the people itself—we, the people—with the power . . . to create a shared world in which all can flourish. . . .").

[3] This brief was a project of the Experiential Learning Lab at New York University School of Law and is submitted in its name as Amicus Curiae. The names of contributors are attached as an Appendix.

Court described marriage as "a thing of common right."[4] The Court has subsequently affirmed the right to marry as fundamental to democratic liberty.[5] In doing so, the Court has upheld a principle that was avowed by the Founders,[6] deepened by the experience of slavery, and formalized by the Fourteenth Amendment's charter of freedom.

Many have expressed concern that because marriage rights are "unenumerated" their constitutional grounding is uncertain.[7] A judge in one of the cases below seemed to express this concern when he said that "[n]obody . . . understood [the Fourteenth Amendment] to require the States to change the definition of marriage."[8] We write to answer concerns about the constitutional grounding of marriage rights

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[4] *Meister v. Moore*, 96 U.S. 76, 79 (1877).

[5] *See Turner v. Safley*, 482 U.S. 78, 96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[6] *See generally* Steven G. Calabresi & Hannah Begley, Originalism and Same Sex Marriage (2014) (unpublished) (on file with authors) (providing an originalist argument in support of same-sex marriage).

[7] *See United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("[T]he Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol."); *see also Bostic v. Schaefer*, 760 F.3d 352, 389 (4th Cir. 2014) (Niemeyer, J., dissenting) ("The Constitution contains no language directly protecting the right to same-sex marriage or even traditional marriage"); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014) (Kelly, J., dissenting) ("The Constitution is silent on the regulation of marriage; accordingly, that power is reserved to the States, albeit consistent with federal constitutional guarantees.").

[8] *DeBoer v. Snyder*, 772 F.3d 388, 403 (6th Cir. 2014).

and to establish that a broadening of state definitions of marriage was immediately understood to be necessary upon ratification of the Fourteenth Amendment.

As students and heirs of antislavery traditions, we argue that unjustified denials of the right of family recognition violate the privileges we hold under the Fourteenth Amendment's Citizenship Clause and the Liberty we are guaranteed under its Due Process Clause.

We embrace, but do not repeat here, Petitioners' argument that to deny recognition of same sex marriages is to deny the equal protection of the laws. Similarily, we embrace, but do not repeat here, Petitioners' argument that there is no legitimate justification for denying same-sex marriage recognition. Our focus is on the constitutional need to give skeptical scrutiny to a state's failure to honor a couple's commitment to marry.

In what follows, we demonstrate that the Fourteenth Amendment's Citizenship, Privileges or Immunities, and Due Process Clauses were designed and rightfully understood in the postbellum period to encompass rights of family recognition. We make that demonstration first with reference to popular understandings of what it meant to repudiate slavery and eliminate its defining constraints, then with reference to the statements of Reconstruction lawmakers, and finally with documentation that the right of family recognition was in every state presumed to have been assured by passage of the Thirteenth and Fourteenth Amendments.

Our argument is not simply that slavery teaches the importance of family recognition or the hurtfulness of its denial. Our argument is that our ancestors

understood the inalienability of rights of family recognition through the experience of slavery and secured those rights when they drafted and ratified the Thirteenth and Fourteenth Amendments.

ARGUMENT

The Fourteenth Amendment restructured the relationship between the Federal Government and the States to ensure protection of human liberty after the abolition of slavery. This establishment of federally guaranteed civic freedom "represented a radical change in the nature of American public life."[9] As Justice Field explained in his *Slaughterhouse* dissent, "[t]he fundamental rights, privileges, and immunities which belong to . . . free people and free citizens, now belong to all as . . . citizen[s] of the United States. . . . They do not derive their existence from . . . [state] legislation, and can not be destroyed by . . . [state] power."[10] Nationalization of fundamental rights was necessary, for, as Justice Thomas has observed, "liberty would be assured little protection if [the Fourteenth Amendment] left each state to decide which privileges or immunities of United States citizenship it would protect."[11] Emancipation, Reconstruction, and the explicit conferral of United States citizenship brought to every person born or naturalized in our nation a bundle of federally protected rights that are appropriately understood as privileges

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[9] Eric Foner, *The Supreme Court and the History of Reconstruction-and Vice-Versa*, 112 Colum. L. Rev. 1585, 1586 (2012).

[10] *Slaughter-House Cases*, 16 Wall 36, 95–96 (1873) (Field, J., dissenting).

[11] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 834-35 (2010) (Thomas, J., concurring).

of citizenship,[12] but have more often been recognized by this Court as aspects of the liberty guaranteed by the Due Process Clauses.[13] Over a century of constitutional deliberation, we have come to understand "the respect the Constitution demands for the autonomy of the person" in making "decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."[14] This evolved understanding of free and autonomous citizenship should not surprise us. It is a predictable result of our experience and repudiation of slavery.

Slavery has been described by one of its most thoughtful and learned students as social death.[15] The social death of slaves resulted from three overlapping factors: degradation, powerlessness and

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[12] The *Slaughter-House* Court's narrower interpretation of the Privileges or Immunities Clause has been roundly criticized. *See generally, e.g.*, Akhil R. Amar, The Bill of Rights: Creation and Reconstruction (1998); Akhil R. Amar, *Substance and Method in the Year 2000*, 28 Pepperdine L. Rev. 601, 631, n.178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment."); James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* Shelby County v. Holder, 8 Harv. L. & Pol'y Rev. 39, 42 & n.19 (2014) ("There is, in fact, a growing 'academic consensus [that] Slaughter-House was wrong . . . .'").

[13] Since the Fourteenth Amendment's ratification, the "liberty" protected by its Due Process Clause has been understood by this Court as "something more than freedom from the enslavement of the body or from physical restraint." *Taylor v. Beckham*, 178 U.S. 548, 602 (1900); *see also, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 142 (1876); *Powell v. Pennsylvania*, 127 U.S. 678, 691 (1888).

[14] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

[15] *See generally* Orlando Patterson, Slavery and Social Death (1982).

"natal alienation."[16] Natal alienation is the outsider status that results when a society refuses to recognize one's kin or kind. It was a defining feature of enslavement:

> American slaves, like their ancient Greco-Roman counterparts, had regular sexual unions, but such unions were never recognized as marriages; . . . both sets of parents were deeply attached to their children, but the parental bond had no social support.[17]

Natal alienation is also a defining feature of the status your Petitioners endure. For example, although Petitioners April DeBoer and Jayne Rowse are life partners raising three children together, Rowse is the legal guardian of two children, and DeBoer is the legal guardian of only one.[18] The laws of Michigan do not allow DeBoer and Rowse to marry, nor do they allow two unmarried people to adopt the same child.[19] The children's parental ties could be broken on the death or incapacity of either of their parents. In Rowse's words, "in Michigan, we're legal strangers. . . . A judge could give our kids to anybody."[20]

As we shall show, the American people, the United States Congress, and the courts and legislators of the reconstructed states appreciated the profound social

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[16] Orlando Patterson, Freedom in the Making of Western Culture 77–78 (1991).

[17] Orlando Patterson, Slavery and Social Death 6 (1982).

[18] *DeBoer v. Snyder*, 772 F.3d 388, 423 (6th Cir. 2014).

[19] *Id.*

[20] Richard Wolf, *Michigan couple poised to make gay marriage history*, USA Today (Jan. 16, 2015, 5:33 pm), http://www.usatoday.com/story/news/2015/01/15/supreme-court-gay-marriage-michigan/21768849/.

isolation of natal alientation. They understood family recognition as an essential component of democratic freedom.

I. REPUDIATION OF SLAVERY AND THE CONSTITUTIONALIZATION OF UNIVERSAL FREEDOM WERE MOTIVATED BY ABHORRENCE OF SLAVERY'S DENIAL OF FAMILY RECOGNITION

The laws of every slave-holding state made it impossible for a slave to enter a legally binding marriage,[21] and the laws of every slave-holding state permitted the separation, by sale or otherwise, of slaves who considered themselves married.[22] The categorical exclusion of slaves and former slaves from this aspect of civic life was generally undisputed.[23] It was said to arise out of slaves' incapacity to make contracts and the "incompatability" of the duties and obligations of marriage with "the relation of slavery."[24]

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[21] Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299, 303-04 (2006).

[22] Thomas R.R. Cobb, An Inquiry Into the Law of Negro Slavery in the United States of America x (1858); Orlando Patterson, Slavery and Social Death: A Comparative Study 189 (1982) ("Throughout the modern Americas the union of slaves and the integrity of their households rarely received legal sanction.").

[23] Although Tennessee recognized that slaves had a limited right to marry, the benefits and obligations of slave marriages did not rise to the level of formal, civic marriage. *Andrews v. Page*, 50 Tenn. 653, 666 (1870) ("We do not hold that [slaves'] marriages were followed by all the legal consequences, resulting from the marriage of white persons.").

[24] *Id.* at 660; *see also Scott v. Raub*, 14 S.E. 178, 179 (Va. 1891) ("It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage.") (quoting *Hall*

Henry Bibb, an American slave, provided a first-hand account of the legal and social situation that ensued. Bibb described the process by which he and his "wife" were "married" by clasping hands, pledging to be true, and calling "on high heaven to witness the rectitude of [their] purpose."[25] Bibb wrote in 1850 that no more binding ceremony was available, "for marriage among American slaves is disregarded by the laws of this country."[26] Bibb's marriage was disrupted when he was sold to a distant master. It

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v. United States, 92 U.S. 27, 30 (1875)); *Johnson v. Johnson*, 45 Mo. 595, 598 (1870) ("Persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one can not be discharged nor the other be recognized without doing violence to the rights of the owner." (quoting *Malinda v. Gardner*, 24 Ala. 719, 727 (1854)); *Jennings v. Webb*, 8 App. D.C. 43, 53 (1896) ("That the legal relation of husband and wife could not exist among slaves, was not an arbitrary rule, prompted by a spirit of cruelty and oppression, but a necessary condition of the institution of slavery whilst it existed. Slaves could make no contracts, own no property; they were themselves property. The recognition of duties, obligations and rights of the legal relation of husband and wife was necessarily incompatible with those conditions.").

[25] Henry Bibb, Narrative of the Life and Adventures of Henry Bibb, an American Slave 38 (3d ed. 1969) (1850).

[26] *Id.* at 38. A former slave interviewed in the 1930s described the process more simply: "When they got married on the places, mostly they just jumped over a broom and that made 'em married. Sometimes one the white folks read a little out of the Scriptures to 'em, and they felt more married." B.A. Botkin, Lay My Burden Down: A Folk History of Slavery 86 (1989). For a description of slave marriage rituals and suggestions concerning their origins, see Herbert G. Gutman, The Black Family in Slavery and Freedom 1750-1925, at 273-81 (1976).

ended years later when he learned that his wife was the mistress of a slaveowner and mother of several of the slaveowner's children. Stories like that of Henry Bibb were common and notorious in the mid-nineteenth century. Herbert Gutman's comprehensive analysis of the slave family probes "[t]he best available evidence – that reported by Mississippi and northern Louisiana ex-slaves [to Union Army clergy registering marriages] – [and] discloses that about one in six (or seven) slave marriages were [*sic*] ended by force or sale. . . ."[27]

The importance of family independence and integrity and the devastating effects of slavery upon the African-American family were paramount themes of the antislavery movement. Harriet Beecher Stowe wrote in 1853 that "[t]he worst abuse of the system of slavery is its outrage upon the family; and . . . it is one which is more notorious and undeniable than any other."[28] An essay on the family appearing in *The Liberator* in 1837 declared: "the most appalling feature of our slave system is, the annihilation of the family institution."[29] William Goodell's treatise on slave law was published by the American and Foreign Anti-Slavery Society to "test the moral character of American slaveholding" by exhibiting statutes

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[27] Gutman, *supra* note 25, at 318.

[28] Harriet Beecher Stowe, A Key to Uncle Tom's Cabin 133 (1853). Stowe writes in response to charges that family separations depicted in Uncle Tom's Cabin were unrealistic or atypical. Her evidence of the prevalence of slave family disruption includes eye-witness accounts of family separations resulting from slave auctions, *id.* at 137, and advertisements for the sale of slaves in South Carolina, *id.* at 134-36, 138-42.

[29] William Wells, *Family Government*, The Liberator 192 (Dec. 1, 1837).

governing American slavery and documenting their effects.[30] To make vivid the effects of laws governing the slave family, Goodell supplemented his legal treatise with anecdotal accounts of families separated by sale and distanced by the demands of servitude, and with a collection of advertisements from Southern newspapers offering rewards for the capture or killing of slaves reported to have run away attempting to rejoin their families.[31]

Slaves did, of course, run away to reunite their families, and free antislavery advocates maintained an Underground Railroad in part to facilitate family reunifications.[32] Moreover, slaves and other antislavery advocates consistently undergirded the demand for release from bondage with the argument that rights of marriage and family were necessary to fulfillment of religious and moral duty and therefore inalienable.[33] To be recognized as human was to be recognized as morally autonomous, and moral and religious autonomy required *family* autonomy. As early as 1773, slaves claiming "a natural right to

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[30] William Goodell, The American Slave Code in Theory and Practice; its Distinctive Features Shown by its Statutes, Judicial Opinions and Illustrative Facts 3 (1853), *microformed on* 19th Century Legal Treatises Nos. 27329-27333 (Research Publications 1987).

[31] *Id.*

[32] Eric Foner, Gateway to Freedom: The Hidden History of the Underground Railroad 200–205 (2015).

[33] *The Disruption of Family Ties*, Antislavery Record 9 (Mar. 1836); Ronald G. Walters, The Antislavery Appeal: American Nationalism After 1830, at 91-92, 95 (1976); Petition, dated May 25, 1774, to the Governor, the Council and the House of Representatives of Massachusetts, *reprinted in* Herbert Aptheker, A Documentary History of the Negro People in the United States 8-9 (1969).

[their] freedoms" petitioned the Massachusetts legislature demanding the liberty to fulfill Christian familial obligations. "How," they asked, "can a husband leave master and work and cleave to his wife? . . . How can the wi[ves] submit themselves to husbands in all things?"[34] The remedy was clear: "[S]laves must be immediately recognized as human beings by the laws, their persons and their rights must be protected. Provisions must be made to establish marriage among them."[35]

As the institution of slavery began to crumble, the right to marry was enthusiastically seized by former slaves, not only for its private meaning, but also for its social meaning.[36] By formalizing family relationships, African-Americans consciously claimed the status and responsibilities of spouse, of parent, and of citizen. The formation of legally recognized marriage bonds marked them as human beings and members of the political community, rather than as chattel.

The rush of former slaves to take a place in the American political community by forming marriages under American law resonates with the rush of many gay and lesbian couples to legalize their commitments when same-sex marriage bans are overturned. Like the nearly 4,0000 same-sex couples who thronged to San Francisco during a one-month period in 2004 when same-sex marriage was newly (and briefly)

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[34] Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 60 (1984).

[35] S.F.D., *People of Color*, 1 New York's Freedom J. No. 7, p. 1 (Apr. 27, 1827).

[36] This process is well documented in Heather Andrea Williams, Help Me to Find My People: The African American Search for Family Lost in Slavery (2012).

available there,[37] former slaves rushed to legalize their partnerships as soon as legalization was possible. For many, it began on Civil War battlefields. In what W.E.B. Du Bois described as a labor strike against the slave system, blacks abandoned Confederate plantations and swarmed to Union camps.[38] Many traveled in families, for family members left behind were at risk of retaliatory abuse and eviction.[39] After a period of consternation, the Union army put the labor of these people to the service of the Union cause on the theory that they were "contraband."[40] When black enlistment was belatedly authorized, black regiments were created, consisting both of escaped slaves and of free blacks. As "contrabands" and free blacks became soldiers, they moved to claim rights of family and take their places as free citizens. As a

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[37] *Court Annuls San Francisco gay marriages*, ASSOCIATED PRESS (Aug. 12, 2004, 4:23 pm), http://www.nbcnews.com/id/5685429/ns/politics/t/court-annuls-san-francisco-gay-marriages/#.VO7YcxbF_Ec. Although the marriages were later invalidated, the number of couples who traveled to San Francisco in hopes that they would receive official recognition was significant. *See generally* Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA Women's L.J. 53, 57 & n.17 (2008) (discussing the relationship between family recognition and participation in civic life); Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 Fordham L. Rev. 1617, 1642-43 (2001) (explaining that the care-giving function of a family unit nurtures civic virtue).

[38] W.E.B. Dubois, Black Reconstruction 1860-1880, at 57 (1935).

[39] 1 Freedom: A Documentary History of Emancipation 1861-1867, ser. 2 at 658 (Ira Berlin et al. eds., 1982) [hereinafter A Documentary History].

[40] 3 A Documentary History, *supra* note 35, ser. 1 at 625-26 (1990).

result, in 1865, before passage of the Thirteenth Amendment, Congress passed and President Lincoln signed a bill freeing the families of black Union soldiers who had not been freed by the Emancipation Proclamation.[41] Military chaplains authorized to solemnize marriages between African-Americans, were innundated with requests. A Freedman's Bureau agent, who reported legalizing seventy-nine marriages in a single day, quoted the response of a black soldier whose character was such "that every word had power":[42]

> Fellow Soldiers: *I praise God for this day*! I have long been praying for it. The Marriage Covenant is at the foundation of all our rights. In slavery we could not have *legalised* marriage: *now* we have it. Let us conduct ourselves worthy of such a blessing – and all the people will respect us – God will bless us, and we shall be established as a people.[43]

The chaplain of a Mississippi Black Regiment reported the legalization of forty-three marriages, saying "I think I witness a very decided improvement in the social and domestic feelings of those married by the authority and protection of Law. It causes them to feel that they are beginning to be regarded and treated as human beings."[44] The chaplain of an Arkansas Black

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[41] Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage and Inviolate Human Rights*, 115 Am. Hist. Rev. 332 (2010).

[42] 1 A Documentary History, *supra* note 35, ser. 2 at 672.

[43] *Id.*

[44] *Id.* at 604.

Regiment reported registration of twenty-five marriages during the month of January 1865 alone.[45] He added, "The Colored People here, generally consider, this war not only their *exodus*, from bondage; but the road, to Responsibility; Competency; and an honorable Citizenship. . . ."[46]

II. SECURING THE RIGHT OF MARRIAGE RECOGNITION WAS AN EXPLICIT OBJECTIVE OF THE FOURTEENTH AMENDMENT'S FRAMERS

The legislators who drafted and approved the Fourteenth Amendment had lived through a passionate national debate over slavery and a prolonged and bloody civil war fought, ostensibly if not entirely,[47] to resolve the slavery question. Like all politically conscious Americans, federal legislators had been bombarded with stories of slavery's denial of formal family ties and its brutal disregard of extra-legal kinship. Members of the Reconstruction Congress also knew that despite emancipation, rights of family remained fragile in the former Confederacy. As Carl Schurz reported to Congress, southern whites still had "an ingrained feeling that the blacks at large

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[45] *Id.* at 712.

[46] *Id.*

[47] DuBois writes that "[t]he duty then of saving the Union became the great rallying cry of [the] war . . . . The only thing that really threatened the Union was slavery and the only remedy was Abolition." Dubois, *supra* note 34, at 56. For other analyses of the causes of the Civil War, see James Mcpherson, Battle Cry of Freedom: The Civil War Era 36 (1988); Shelby Foote, The Civil War: A Narrative (1974).

belong[ed] to the whites at large."[48] Schurz used the example of a southern planter to describe how the deeply engrained habit of regarding black people as property rather than as free citizens persisted:

> As to recognizing the rights of freedmen to their children, I will say there is not one man or woman in all the South who believes they are free, but we consider them as stolen property – stolen by the bayonets of the damnable United States government.[49]

Working with an awareness of the notorious and continuing deprivation of African-American family integrity, members of Congress repeatedly acknowledged during debates over the Reconstruction Amendments and related legislation that freedom required restoration of family rights. We include here a representative sample of their remarks.[50]

Senator Clark declared that slavery had "practiced concubinage, destroyed the sanctity of marriage, and sundered and broken the domestic ties."[51] Representative Broomall pronounced it,

> strange that an appeal should be made to humanity in favor of an institution which allows the husband to be separated from the wife, that allows the children to be taken from the mother;

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[48] Dubois, *supra* note 36, at 136 (quoting S. Exec. Doc. No. 2, 39th Cong., 1st Sess., Report of Carl Schurz (1865)).

[49] *Id.* at 142 (quoting Report of the Joint Committee on Reconstruction, Part II, 39th Cong., 1st Sess. 1866).

[50] For a more comprehensive account, see Peggy Cooper Davis, *Neglected Stories*: The Constitution and Family Values 38-40, 112-17 (1997).

[51] Cong. Globe, 38th Cong., 1st Sess. 1369 (1864).

> ah! that allows the very children of the deceased slaveholder himself to be sold to satisfy his merciless creditors.[52]

In response to the claim that slavery had biblical or divine sanction, Representative Shannon asked, "What divinity [is there] in tearing from the mother's arms the sucking child, and selling them to different and distant owners?"[53] Senator Harlan spoke of "incidents of slavery" that did violence to divine law. The first mentioned were denials of the rights to marry and to parent: "[I]n none of the slave States . . . was [the marriage] relation tolerated in opposition to the will of the slaveowner; and . . . in many of them . . . it . . . was prohibited absolutely by their statute laws."[54] Senator Sumner asked his colleagues to imagine an extraterrestrial visitor beholding the spectacle of slavery: "[A]stonishment . . . would swell into marvel as he learned that in this Republic . . . there were four million human beings in abject bondage, degraded to be chattels . . . despoiled of all rights, even the . . . sacred right of family."[55] Representative Kelly borrowed language from 1780 legislation abolishing slavery in Pennsylvania to say that enslaved African-Americans had been "deprived . . . of *the common blessings that they were by nature entitled to* [and] . . . cast . . . into the deepest afflictions, by an unnatural separation and sale of husband and wife from each

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[52] Cong. Globe, 38th Cong., 2d Sess. 221 (1865).

[53] Cong. Globe, 38th Cong., 1st Sess. 2948 (1864).

[54] *Id.* at 1439 (statement of Sen. Harlan).

[55] *Id.* at 1479.

other and from their children. . . ."[56] Congressman Creswell reminded the House that:

> [t]he slave could sustain none of those relations which give life all its charms. He could not say my home, my father, my mother, my wife, my child, my body. It is for God to judge whether he could say my soul. The law pronounced him a chattel, and these are not the rights or attributes of chattels.[57]

In response to the slaveholders' claim of vested rights in their slave property, Congressman Farnsworth exclaimed,

> Vested rights! What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? *Did not our fathers declare that those rights were inalienable?*[58]

Congressman Kasson identified the marital relation, the parental relation, and the right of personal liberty as the "three great *fundamental natural rights of human society*" and pronounced them inalienable.[59] Expressing faith that freedom encompassed rights of family integrity, Senator Wilson declared that upon ratification of the Thirteenth Amendment, "[t]he sharp cry of the agonizing hearts of severed families

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[56] *Id.* at 2984 (emphasis added).

[57] Cong. Globe, 38th Cong., 2d Sess. 120 (1865) (statement of Rep. Creswell).

[58] Cong. Globe, 38th Cong., 2d Sess. 200 (1865) (emphasis added).

[59] *Id.* at 193 (emphasis added).

[would] cease to vex the weary ear of the nation . . . ."[60] During a discussion of civil rights legislation, Senator Trumbull offered an amendment to make former slaves citizens.[61] His subsequent remarks describe the intended scope of the rights to be conferred:

> It is difficult, perhaps, to define accurately what slavery is and what liberty is. Liberty and slavery are opposite terms; one is opposed to the other. . . . Civil liberty . . . is thus defined by Blackstone: "Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public." *That is the liberty to which every citizen is entitled.*[62]

When consideration of the Trumbull amendment resumed on the following day, Senator Howard responded to colleagues who claimed that Congress lacked the authority to enforce general citizenship rights on behalf of freedmen. In doing so, he spoke specifically of rights of home and family:

> [The slave] had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend. . . . What definition will you attach to the word "freeman" that does not include these ideas?[63]

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[60] Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (emphasis added).

[61] Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

[62] *Id.* (emphasis added).

[63] *Id.* at 504.

Citizenship and all of its privileges and immunities were indisputably conferred with ratification of the 14th Amendment.[64] As we shall see, there was no dispute that this conferral encompassed a right of marriage recognition.

III. WITH PASSAGE OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS EXTENSION OF THE RIGHT OF MARRIAGE RECOGNITION WAS PRESUMED TO BE REQUIRED IN EVERY STATE

As we discussed in Section I of our Argument, the laws of every slave-holding state, including the eleven states of the former Confederacy, made it impossible for a slave to enter a legally-binding marriage. Upon emancipation, however, the former Confederate states recognized that "domestic relations of that class of persons who have been recently released from the condition of slaves and given the rights and privileges of free persons" was "of great importance."[65] In response, they found that, "justice and humanity, as well as sound public policy, demanded legislation giving legal sanction, as far as possible, to the moral obligations of [former slave marriages], and rendering legitimate the offspring thereof."[66]

Accordingly, between 1865 and 1870 all eleven states of the former Confederacy revised their laws to

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[64] U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

[65] *McReynolds v. State*, 45 Tenn. 18, 20 (1867).

[66] *Jennings v. Webb*, 8 App. D.C. 43, 54 (1896).

recognize marriages between former slaves.[67] The mechanism for recognizing former slave marriages varied from state to state. Some states, like Tennessee,[68] Virginia,[69] and South Carolina,[70] considered the marriage right to vest automatically in couples who had entered customary slave marriages, so long as the couple continued to cohabitate after both partners had been emancipated. North Carolina[71] and Louisiana[72] required that the partners declare their intent to be married before a public official. Some states made the marriage right available retroactively, recognizing even those marriages that had dissolved before emancipation, legitimizing the children of those marriages, and protecting their inheritance rights.[73]

As the reactions of the formerly Confederate states show, the right to marry was not only incompatible

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[67] *See* Goring, *supra* note 20, at 316 n. 87, 316 n.100, 324 n.123, 325 n.127, 326 n.131, 331 n.167, 332, 334 n.185, 335 n.193 & 336 n.196 (compiling Tennessee (1866), Louisiana (1868), Virginia (1866), South Carolina (1865, modified in 1872), North Carolina (1866), Florida (1866), Arkansas (1866), Mississippi (1865), and Georgia (1866) statutes respectively); Washington, *supra* note 3 (describing Alabama (1865) and Texas (1870) statutes).

[68] *See, e.g.*, *Goring*, supra note 20, at 316.

[69] *Id.* at 324–25 n.123.

[70] *Id.* at 326 n.131.

[71] *Id.* at 331 n.169.

[72] Although the Act of 1868 provided that "slave couples were required to acknowledge their moral marriage before a notary public or other authorized governmental entity before 1870, Goring, *supra* note 20, at 322, Louisiana courts recognized marriages between former slaves who had failed to do so. *Succession of George Devezin*, 7 Teiss 111, 114 (La. Ct. App. 1910).

[73] *See, e.g.*, Goring, *supra* note 19, at 326–27 (discussing the retroactive application of South Carolina's act legalizing certain marriages).

with slavery, but also requisite to citizenship. Accordingly, the highest court in our nation's Capitol created an enhanced presumption of legitimacy when retroactively examining slave marriages. Holding that any set of circumstances giving rise to the inference of actual marriage among white persons, should operate similarly, if not more strongly, when experienced by former slaves, the court wrote: "The liberality of the presumption, that may be indulged in a case of this kind, beyond that in the case of free white people, has a foundation in reason as well as in natural justice."[74]

CONCLUSION

Judges considering marriage rights cases have frequently analogized the failure to recognize same-sex marriages and the prohibition of miscegenation.[75] An analogy with the denial of slave marriages is even more apt, for the denial of marriage rights goes beyond the insult of segregation to the indifference of exclusion. To bar a group altogether from an institution as central to civic and social life as marriage is akin to imposing the social death that isolated slaves from the body politic. Both exclusions are "rooted in a fundamental refusal to provide social recognition to the humanity" and dignity of the excluded

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[74] *Jennings v. Webb*, 8 App. D.C. 43, 56 (1896).

[75] *Bishop v. Smith*, 760 F.3d 1070, 1113 (10th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 478 (9th Cir. 2014) (Reinhardt, J., concurring); *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014); *Hamby v. Parnell*, No. 3:14-CV-00089-TMB, 2014 WL 5089399, at *5 (D. Alaska Oct. 12, 2014); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2015 WL 144567, at *7-8 (D.S.D. Jan. 12, 2015); *Campaign for S. Equal. v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *13-14 (S.D. Miss. Nov. 25, 2014).

group.[76] Both are resisted in order that the excluded group might acquire the measure of civil and political autonomy appropriate to a scheme of ordered liberty. The fundamental human right to own and define ourselves and to exercise moral autonomy is justly limited to prevent tangible harms to others or to achieve material advances of the common welfare. It should never be limited for the purpose of imposing a majoritarian choice about the beauty, morality, or religious acceptability of a particular family form.[77]

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[76] Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105, 108, 147 (2009) ("[W]hite society faced no greater obstacle to recognizing marriage for newly-emancipated slaves than the belief best expressed by Thomas Jefferson that African American [intimate] relationships were based on 'eager desire.'"). To recognize a people's marriages is, rather, to appreciate the depth and complexity of their life partnerships. *Turner v. Safley*, 482 U.S. 78, 95 (187) (describing marriage as an expression "of emotional support and public commitment" and an aspect of religious life).

[77] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

APPENDIX

APPENDIX

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